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File No: 199/6.20

September 22, 2020

**VIA ELECTRONIC MAIL**

The Honorable Kenneth Leary, Chairperson  
and Members of the Local Agency Formation Commission  
of Napa County  
1030 Seminary Street, Suite B  
Napa, CA 94559

Re: Revised; October 5, 2020 Regular Meeting; **Consideration and Approval  
of Water and Wastewater Municipal Service Review**

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Dear Chair Leary and Commission Members,

This office serves as the City Attorney for the City of American Canyon ("City"), which at a properly noticed Closed Session of its City Council on September 15, 2020, authorized this office and the City Manager, Jason B. Holley, to take all actions necessary before the Commission at the October 5, 2020 meeting, to *oppose* the consideration and possible adoption of the draft Countywide Water and Wastewater Municipal Service Review (the "MSR").

The Local Agency Formation Commission ("LAFCO") Executive Officer, Staff and Consultants maintain that the Water Service Area ("WSA") of the City, is the City's current boundaries rather than that established at the City's incorporation in 1992.

Discussions on this issue have been ongoing between this Office, the City Manager and LAFCO representatives *since February 8, 2019*. At that time, the City was contacted by LAFCO Staff to obtain the incorporation documents for the City from 1992 for use by the MSR Consultants. No explanation was offered as to why the City incorporation documents were not present in LAFCO records. LAFCO Staff was supplied with not only the incorporation documents, but those documents associated with their environmental review under the California Environmental Quality Act (Public Resources Code Section 21000 *et seq.*, ("CEQA")).

Notwithstanding the meetings between City Staff, LAFCO Staff and Consultants, there remain several unresolved factual and legal issues concerning the LAFCO Executive Officer's claim that the City WSA at the time of incorporation is not the City WSA, but rather is the existing City limits.

The City disagrees with the LAFCO Executive Officer's conclusion and the proposal to move forward despite these unresolved issues by a simple statement, that the issue remains unresolved. *See*, LAFCO Comment Log (attached as Exhibit "A"), page 1, line 5.

In the Commission's Workshop on July 13, 2020, it was precisely stated that the matter is a "detailed and complex problem" to be resolved with the LAFCO Executive Officer, Staff and Project Consultants.

Given the significant impacts of the possible adoption of this MSR by the Commission *without* City WSA resolution, the City demands that the matter *be continued* until the issues are fully resolved with the LAFCO Executive Officer, Legal Counsel and Consultants. Both the undersigned and Mr. Holley will be available for questions on October 5, 2020<sup>1</sup> before the Commission.

At the August 3, 2020 Commission meeting, the matter was considered under Agenda Item No. 7.c., where the Staff Report incorporated a reference to "MSR figure 3-14; Governance Structure Options," a copy of which is attached as Exhibit "B." Under the heading "Governance Structure Options," the following is set forth with respect to the City of American Canyon Governance Options:

- Clarification of LAFCO - approved service area;
- Inclusion of non-contiguous city-owned property in SOI or clarification of LAFCO policy; and,
- Participation in a county water agency.

Stated differently, how can LAFCO proceed to consider and adopt any of the draft MSR "Governance Options" *until* it is known what the baseline footprint is with respect to the City WSA?

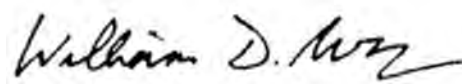
The City fails to see how there is evidence, or an analysis, by the Executive Officer, LAFCO Staff, Legal Counsel or Consultants that establishes a Governance baseline so that

<sup>1</sup> The City representatives at the Commission July 13, 2020 Workshop are also referenced in Exhibit "B." *See*, the next to last page.

the critical issues associated with the City WSA, can serve as a basis for further recommendations to the Commission.

The City also maintains that the lack of *any* substantive analysis of the MSR under the CEQA, provides a second reason why the proposed action should be continued.

Very truly yours,

A handwritten signature in black ink, appearing to read "William D. Ross", enclosed in a rectangular box.

William D. Ross  
City Attorney

WDR:as

cc: Brendon Freeman, Executive Officer  
Local Agency Formation Commission

The Honorable Leon Garcia and Members of the City Council  
Jason B. Holley, City Manager  
City of American Canyon

Enclosures: ~~Exhibit "A" (Comment Log)~~  
~~Exhibit "B" (Staff Report)~~

Exhibits removed due to file size.

Exhibit "A" is available online at:

[https://www.napa.lafco.ca.gov/uploads/documents/DraftMSR\\_CommentLog.pdf](https://www.napa.lafco.ca.gov/uploads/documents/DraftMSR_CommentLog.pdf)

Exhibit "B" is available online at:

[https://www.napa.lafco.ca.gov/uploads/documents/8-3-20\\_7c\\_CommentsDraftWaterWastewaterMSR.pdf](https://www.napa.lafco.ca.gov/uploads/documents/8-3-20_7c_CommentsDraftWaterWastewaterMSR.pdf)

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Los Angeles, CA 90025

File No: 199/6.20

October 5, 2020

**VIA ELECTRONIC MAIL**

The Honorable Kenneth Leary, Chairperson  
and Members of the Local Agency Formation Commission  
of Napa County  
1030 Seminary Street, Suite B  
Napa, CA 94559

Re: October 5, 2020 Regular Commission Meeting; Agenda Item No. 7.a. Final Map  
and Countywide Water and Wastewater Municipal Service Review and Associated  
CEQA Findings

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Dear Chair Leary and Commission Members,

This office serves as the City Attorney for the City of American Canyon ("City"), and again respectfully maintains with respect to the proposed Napa Countywide Water and Waste Water Municipal Service Review ("proposed MSR") that the Water Service Area ("WSA") of the City is that which was succeeded to at the time of incorporation of the former American Canyon County Water District ("ACCWD"), rather than what has been maintained by the Project Consultants and LAFCO Staff as the corporate boundaries of the City.

The action of the Consultants in evaluating this issue supports the City's position. Originally, with respect to the Draft Municipal Service Review ("Draft MSR") on pages 64, 86 and 92, it was maintained that the ACCWD was in fact dissolved. A dissolution under the Cortese-Knox Reorganization Act of 1985 and presently under the Cortese-Knox-Hertzberg Reorganization Act of 2000, is a "change of organization."<sup>1</sup>

In other words, there had to be *another change of organization* at the time of incorporation to provide the legal basis for the current LAFCO Staff, Executive Officer and LAFCO Counsel position.

<sup>1</sup> See, current Government Code Section 56021(h), a part of the Cortese-Knox-Hertzberg Local Government Reorganization Act of 2000 (Government Code Section 56000 et seq., (the "Act"). The Act was and is a substantial update of its predecessor, the Cortese-Knox Local Government Reorganization Act of 1985 (former Government Code Section 56000 et seq.). (the "Former Act"). All references will be to the Government Code unless otherwise noted.



A review of Attachment 6 by LAFCO Counsel to the current Staff Report does not change the City's position. Respectfully, issues associated with the Sewer Service Area, although occurring within the same broad time period, are not relevant to the issue of determining the City WSA for purposes of analysis in the proposed MSR.

As City has noted previously, a "merger" of the ACCWD was accomplished with the City at the time of incorporation in 1992. A "merger" is legally defined under the Former Act and the Act by Section 56056: a merger results in the successor local agency, here the City, *assuming all the merged entity's rights and obligations*. These rights and obligations were set forth in Exhibit B, entitled "American Canyon Incorporation Terms and Conditions" to Commission Resolution No. 91-18, which is enclosed.

Among those conditions were the following:

1. The City of American Canyon *shall be the successor to the American Canyon County Water District for the purpose to succeeding all the rights, duties and obligations of said District* with respect to enforcement, performance or payment of any outstanding voter approved bonds and implied or expressed contracts, judgments and obligations of said Districts; and,
2. *All property, whether real or personal, including all monies or funds (including cash on hand and monies due but uncollected) of the American Canyon County Water District shall be transferred to and vested in the City of American Canyon.* All equities, reserves and fund balances (operating, dead service and construction) generated through past operation of the American Canyon County Water District, shall be transferred to the City of American Canyon to be maintained or dispersed for the water utility, sewer or recreation purposes for which they were established. (Emphasis added).

Stated differently, under the conditions of Exhibit B (pp B5-B7), the City became legally obligated to supply domestic water to the unincorporated area of South County, as set forth in the ACCWD WSA at the time. This would be consistent with applicable law. In *People ex rel. City of Downey v. Downey* (1962) 202 Cal. App. 2d786, 797. When a city acquires a water system from a county water district, the city thereafter has the duties and obligations that the county water district previously had, and the inhabitants of the county water district have the same rights to receive water from the city that they formerly had to receive water from the District.

As previously noted, these conclusions are fully supported by the Final Environmental Impact Report for the incorporation where the ACCWD WSA is portrayed, which is enclosed.

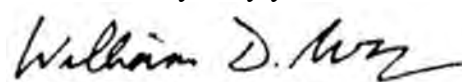
The City has retained Michael B. Colantuono, of Colantuono, Highsmith & Whatley, PC, for peer review of this issue. His conclusions are as follows:

1. When the City was incorporated, it was authorized to provide water and sewer services outside the City limits in a territory formerly served by a special district to which the City is the successor agency. Those service rights cannot be taken from the City other than by a reorganization approved pursuant to the Cortese-Knox-Hertzberg Act.
2. Because the City is a city, and not a special district, LAFCO has no power to initiative a change of organization to strip the City of authority to provide water and sewer services in its extra-territorial service area. It matters not that the City acquired those rights as the successor agency to a special district; it has those rights as city. If a change of organization is to be proposed to alter the status quo, an affected agency (likely the City or the County) will need to initiative it. LAFCO's power to initiate changes of organization is limited to those affecting special districts.

In summary, whether by detachment or dissolution, another change of organization must take place to support the current Commission position.

The City respectfully requests that the matter be continued in order to address and resolve this ongoing conflict, between the law and facts, as reflected in the documents between the City and Commission on the extent of the City WSA.

Very truly yours,



William D. Ross  
City Attorney

WDR:jf

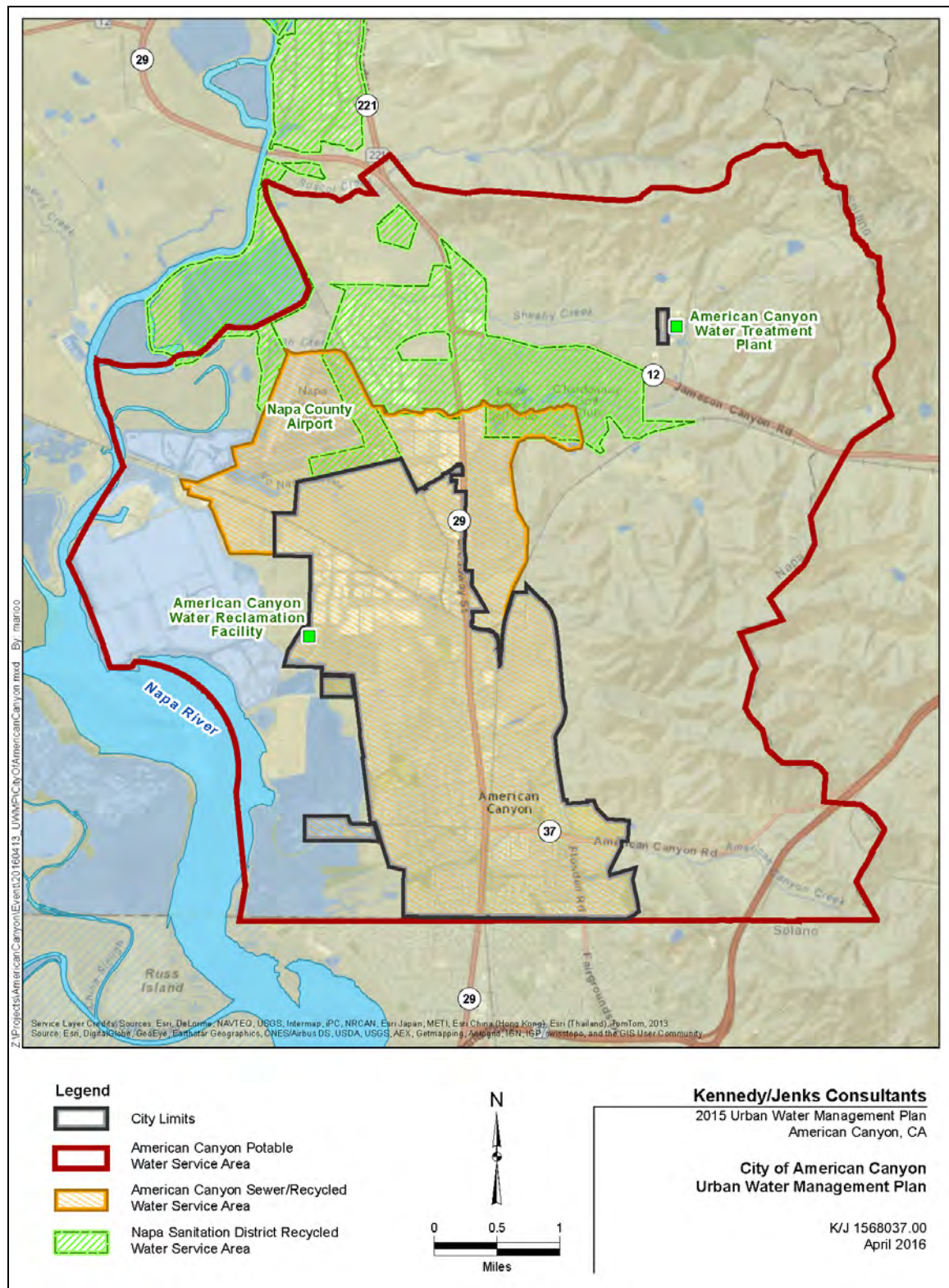
cc: Brendon Freeman, Executive Officer  
Local Agency Formation Commission

The Honorable Leon Garcia and Members of the City Council  
Jason B. Holley, City Manager  
City of American Canyon

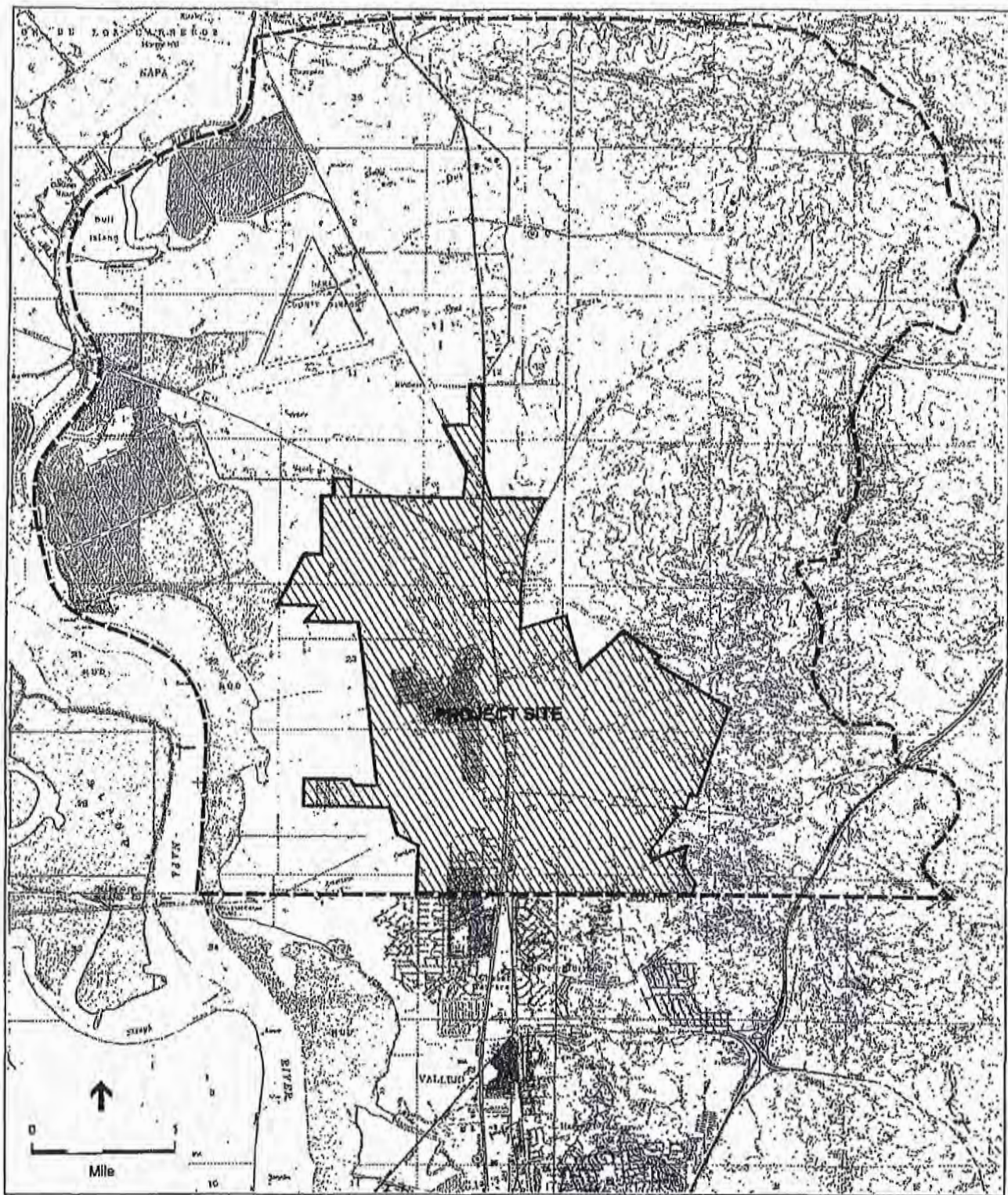
Deanne Gillick, General Counsel  
Napa County LAFCO

Enclosures

Figure 3-1: Water Service Area Map







SOURCE: American Canyon County Water and Sewer District

American Canyon 10384 ■

**Figure 14**  
**ACCWD Water Service Area**

**From:** [Phil Brun](#)  
**To:** [Jennifer Stephenson](#); [Freeman, Brendon](#)  
**Cc:** [Joy Eldredge](#); [Patrick Costello](#); [Michael Barrett](#)  
**Subject:** Revised Draft Water/Wastewater MSR  
**Date:** Tuesday, September 15, 2020 8:50:01 AM  
**Attachments:** [C2019 323 Carneros Mutual Water Compandy.pdf](#)

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[External Email - Use Caution]

Jennifer and Brendon,

I have briefly looked through the redline draft of the LAFCO Water/Wastewater MSR and don't have any significant concerns with revisions, however I wanted to advise you that Carneros Mutual Water Company (referred to as Carneros Inn in the report) has activated their service from the City of Napa pursuant to the attached agreement. I understand that the County has placed conditions on Carneros Inn related to groundwater use once the connection to the City has been made. These details seem appropriate for the new section on private water companies that has been added to the report.

PHIL

Phil Brun Jr., PE  
Utilities Director, Utilities Department  
City of Napa | P.O. Box 660 | Napa, CA 94559-0660  
☎ 707.257.9316 | 707.246-2824 (cell) | ✉ [pbrun@cityofnapa.org](mailto:pbrun@cityofnapa.org)  
***Water • Solid Waste • Recycling***



## WHOLESALE WATER SUPPLY AGREEMENT BETWEEN THE CITY OF NAPA AND CARNEROS MUTUAL WATER COMPANY

This Wholesale Water Supply Agreement ("**Agreement**") by and between the City of Napa, a California charter city ("**City**"), and the Carneros Inn Mutual Water Company dba Carneros Mutual Water Company, a nonprofit mutual water company ("**Water Company**"), is effective on the Effective Date identified on the signature page.

### RECITALS

A. City is the owner and operator of a water system in the County of Napa, State of California, and is engaged in the supply and distribution of water to customers inside and outside of the City's corporate limits.

B. Water Company is the owner and operator of an on-site water treatment and distribution system for groundwater in the County of Napa, State of California, and is engaged in the distribution of water to customers within the boundaries of its service area.

C. Due to challenges with groundwater quality and quantity, Water Company has been purchasing water from the City since 2008 through a hydrant and trucking it on site. To reduce the water truck trips, Water Company requested wholesale water service from the City to serve existing development within Water Company's service area depicted on **Exhibit A ("Carneros Water Service Area")**, which is attached hereto and incorporated by this reference.

D. City staff has determined that the City has sufficient treatment, storage, and conveyance capacity to accommodate Water Company's request and that providing the wholesale water service will have no adverse effect on water supply availability.

E. Congress Valley Water District ("**District**") was formed in 1949 to provide water service to the unincorporated community of Congress Valley. The District currently provides water service to approximately 99 active connections through pipelines owned by the District ("**CVWD Pipes**"). The District has no developed water supply resources or storage facilities. Instead, the City has supplied water to the District since 1951 pursuant to a Water Supply Agreement ("**CVWD Contract**"). Under the CVWD Contract, the City has the right to wheel water through CVWD Pipes to serve City customers.

F. To receive City water, Water Company intends to connect its system via a private water line to an 8-inch diameter pipeline that is part of CVWD's Pipes located on Old Sonoma Road approximately 2,700 feet from the Carneros Water Service Area and more particularly identified on **Exhibit B ("Interconnection")**, which is attached hereto and incorporated by this reference. On December 10, 2018, the District's Board adopted Resolution 67 approving conditions of approval for Water Company's connection and pipeline extension.

G. City Charter Section 180 prohibits extension of water service outside City limits and the City Rural Urban Limit Line ("**RUL**") unless the extension is approved by a four-fifths (4/5) vote of the City Council (or under limited exceptions not applicable here).

H. Water Company's water service area is outside the City limits and outside the RUL and requires a four-fifths (4/5) vote of approval by the City Council to be granted service.

I. Under the Cortese-Knox-Hertzberg Local Government Reorganization Act, particularly California Government Code Sections 56133 and 56133.5, the Local Agency Formation

Commission of Napa County ("LAFCO") is required to review and approve any proposed new or extended water service outside the City's sphere of influence to support existing uses.

J. City staff and Water Company developed a non-binding summary of conceptual terms of a wholesale water agreement described in **Exhibit C ("Term Sheet")**, which is attached hereto and incorporated by this reference. The Term Sheet identified the service area and uses for City water, established a maximum water supply, specified applicable rates and fees for water service, and identified the infrastructure requirements for the water service. The Term Sheet also specified a supplemental contribution to be paid by Water Company towards the design and construction of a new water storage tank to serve the Browns Valley area as consideration to induce the City to extend water service to the Water Company and to facilitate the regional effort to promote water sustainability.

K. On March 20, 2018, the City Council adopted by a 4-1 vote, Resolution R2018-032, authorizing extension of outside-City water service to Water Company, subject to: (a) execution of a Wholesale Water Agreement in a form satisfactory to the Public Works Director, and approved as to form by the City Attorney, in substantial conformance with the Term Sheet; (b) authorization from LAFCO, pursuant to Government Code Sections 56133 and 56133.5, to extend the water service to existing uses involving public or private properties; and (c) approval of a use permit or use permit modification authorizing the water line extension and connection and associated California Environmental Quality Act ("**CEQA**") analysis by Napa County.

L. The City and Water Company now wish to formalize the terms and conditions conceptually established in the Term Sheet.

NOW THEREFORE, the City and Water Company, for the mutual consideration described herein, agree as follows:

1. **TERM**. The term of this Agreement begins on the date it is signed by the City Clerk, below, attesting to full execution of the Agreement by both parties ("**Effective Date**"), and ends on June 30, 2069 ("**Term**"), unless terminated earlier as provided herein.

2. **WHOLESALE WATER SERVICE**. Subject to the terms and conditions set forth herein, City shall annually deliver to Water Company the quantity and quality of water described herein for the Term of this Agreement. The term "annually" or "fiscal year" as used herein shall refer to the period from July 1 of any year through June 30 of the following year.

3. **QUANTITY OF WATER DELIVERIES**.

3.1 **Water Supply**. City shall deliver and Water Company shall accept and purchase up to a maximum of forty-three (43) acre-feet of water annually ("**Water Supply**"). Any portion of the Water Supply that is available for delivery by City and that is not accepted and/or purchased by Water Company during a given fiscal year shall be forfeited and shall not roll over to the next fiscal year. If City, in its sole and absolute discretion, agrees to deliver unused Water Supply water in a subsequent fiscal year, such late delivery shall be an accommodation to Water Company and shall not constitute a waiver or amendment to the terms of this Agreement.

3.2 **Inadvertent Excess Water Use**. City shall have no obligation to supply water in excess of the annual Water Supply provided for under this Agreement. If Water Company inadvertently exceeds the maximum annual use of water in any fiscal year, the City shall report the excess use to the County of Napa, and Water Company shall decrease its annual use in the subsequent year so that the average annual water use over any two years will not exceed 43 acre-feet.

3.3 **Water Conservation Requirements**. If a water supply shortage occurs, as determined by City in its sole and exclusive discretion, upon receipt of written notice from City, Water Company shall apply water conservation requirements and restrictions to its customers that are no less



restrictive than those placed on City customers. City shall not determine that there is a water supply shortage unless it is imposing water conservation requirements and restrictions on its own customers.

3.4 Trucked Water. The water provided under this Agreement shall be conveyed to Water Company via the City meter located within the Interconnection as described in Paragraph 6.1 (Point of Delivery). Commencing with the delivery of water to Water Company under this Agreement, City shall have no obligation to provide, and Water Company agrees to waive any right to request or receive, trucked water for any use within the Carneros Water Service Area; provided, however, that to the extent Water Company presents evidence of interruption of delivery as described in Paragraph 6.3 (Interruption of Delivery), City may provide trucked water to Water Company in an amount not to exceed a total of 43 acre-feet of water per fiscal year.

#### 4. WATER QUALITY.

4.1 Potability. The Water Supply delivered to Water Company by City shall be of suitable quality for human consumption and of the same quality that City delivers to its residential customers. No later than 24 hours after either party becomes aware of any significant impairment of water quality (delivered under this Agreement) that affects its suitability for human consumption, that party shall notify the other party. City and Water Company shall cooperate to identify the cause of such change in water quality. To the extent that the quality standards which are applicable to Water Company exceed the quality standards provided for in this Agreement, Water Company shall be responsible for any necessary additional treatment of the Water Supply. Water Company shall be solely responsible for any actual liability resulting from a change in water quality occurring beyond the Point of Delivery (as described in Paragraph 6.1), including any additional treatment undertaken by Water Company, and shall indemnify and hold City harmless from any actual liability which arises from any such change in the manner provided for in Paragraph 11.2 (Indemnification).

4.2 Double Check Valve. Water Company shall install and maintain a double check valve cross connection control device as close as practical to the Interconnection described in Paragraph 6.1 (Point of Delivery). The double check valve shall be approved by City prior to installation. Water Company shall provide yearly testing reports to City to certify that the device is operational. Water Company shall repair or replace a malfunctioning or failing device within fifteen (15) days of notification.

#### 5. PRICE AND PAYMENT.

5.1 Fees and Charges. City shall charge Water Company, and Water Company shall pay the City, the then-current fees and charges in effect for "Commercial Customers" that are "Outside City Limits," (as those terms are defined by applicable City Council resolutions) including any and all one-time fees and charges to cover the City's costs to install or modify water services and/or to establish connection to the City's water system. As of the execution of this Agreement, the current fees and charges in effect are documented in the City's Master Fee Schedule, which includes the water rates established by City Council Resolution R2017-153 (and the water service customer classes are defined in Exhibit D thereto). The parties acknowledge and agree that the current fees and charges may be updated from time to time by City Council resolution, and incorporated into this Agreement as if set forth in full.

5.2 Supplemental Contribution. In consideration for City's discretionary approval of the terms of this Agreement and the mutually beneficial goal of increasing the sustainability of the region's water supply, Water Company shall pay City an amount equal to half of the City's costs to design and construct a new water storage tank to serve the Browns Valley area ("**Contribution**"), provided that Water Company's Contribution shall not exceed 1.75 million dollars (\$1,750,000.00). Water Company shall pay the Contribution to City no later than the initial delivery of wholesale water from City to Water Company, whereupon City shall deposit said funds into an escrow account and hold the funds for the sole benefit of City until construction of the storage tank is complete. The principal



in the escrow account may not be withdrawn until City determines the construction is final and complete and City notifies Water Company in writing of the same. Upon completion, City shall retain the entire \$1.75 million payment; provided, however, that if the cost of construction is less than \$3.5 million, then City shall reimburse Water Company with the escrow funds in an amount equal to \$1.75 million less 50% of the cost of design and construction. Water Company shall be responsible for paying all fees for the expenses incurred by the escrow agent and City in administering the escrow account. The interest earned on the funds held in escrow shall be for the sole account of Water Company and shall be paid to Water Company upon final disposition of the Contribution.

### 5.3 Billing.

5.3.1 Invoices. City shall bill Water Company no more frequently than on a monthly basis for water supplied during the previous month(s), and Water Company shall pay the bill within thirty (30) days of the date of the bill. The amount payable by Water Company to City shall consist of a Fixed Service Charge (based on meter size) and a Water Quantity Charge (based on the total quantity of water delivered per 1,000 gallon units) multiplied by the applicable fees and charges (as determined in Paragraph 5.1 (Fees and Charges)), and an Elevation Charge (for pumped zone customers), plus any other costs, fees or charges due and payable by Water Company pursuant to City's master schedule of water fees and charges as may be amended from time to time by the City Council. Delinquent bills shall bear interest at the rate of ten percent (10%) per annum. A supplemental bill will be sent at the end of a fiscal year if less than 33 acre-feet of water is taken to ensure Water Company makes the minimum payment provided for in Paragraph 5.3.2 (Minimum Payment).

5.3.2 Minimum Payment. Notwithstanding any other provisions in this Agreement, Water Company shall be obligated to pay City for all water delivered or made available for delivery by City to the Interconnection, which amount shall be no less than 33 acre-feet annually, whether or not: (a) Water Company has taken less than 33 acre-feet of water as of the final billing for a fiscal year, or (b) Water Company is able to make beneficial use of the total quantity of such water. Water Company's failure or refusal to accept delivery of water to which it is entitled under this Agreement shall in no way relieve Water Company of its obligation to make payments to City as provided for in this Agreement.

5.3.3 Billing Disputes. If Water Company contests the accuracy of any bill submitted to it pursuant to this Agreement, it shall give City notice thereof at least ten (10) days prior to the day upon which payment of the stated amounts is due. To the extent that City finds Water Company's contentions regarding the bill to be correct, it shall revise the bill accordingly, and Water Company shall make payment of the revised amounts on or before the due date. To the extent that City does not find Water Company's contentions to be correct or where time is not available for a review of such contentions prior to the due date, Water Company shall make payment of the stated amounts on or before the due date but may make the contested part of such payment under protest and seek to recover the amount thereof from City. If the parties are unable to reach an agreement regarding disputed charges, disputes shall be resolved pursuant to Section 10 (Dispute Resolution).

5.3.4 Nonpayment. If Water Company defaults in the payment of any money required to be paid to City hereunder, City may, upon not less than thirty (30) days written notice to Water Company, suspend deliveries of water under this Agreement for so long as such default continues. During such period, Water Company shall remain obligated to make all payments required under this Agreement. Action taken pursuant to this paragraph shall not deprive City of or limit the applicability of any remedy provided by this Agreement or by law for the recovery of money due or which may become due under this Agreement.

## 6. DELIVERY OF WATER.

6.1 Point of Delivery. The physical point of delivery of water pursuant to this Agreement shall be the City-installed meter located at the proposed interconnection between the Water Company water distribution system and an 8-inch diameter pipeline on Old Sonoma Road operated by the District as is more particularly depicted in Exhibit B.

Water Company has the physical ability to control the rate, time, and amount of delivery, and shall not take delivery of more water than it is entitled to receive under this Agreement or at rates greater than that set forth in Paragraph 6.2 (Rate of Delivery).

6.2 Rate of Delivery. Absent *force majeure* or other exigent circumstances beyond Water Company's control, the rate of delivery shall not exceed one hundred sixty (160) gallons per minute at any time.

6.3 Interruption of Delivery. City may temporarily discontinue or reduce water deliveries as herein provided for the purposes of investigation, inspection, maintenance, repair or replacement of its water system facilities necessary for the delivery of water to Water Company, as well as due to outages in, or reduction in capabilities of such facilities beyond City's control, or in the event of an emergency or disaster, including, but not limited to *force majeure*, earthquakes, droughts, floods, storms, explosions, fires, labor troubles, strikes, insurrection, riots, acts of the public enemy, or federal or state order, rule, or regulation preventing the City, in whole or in part, from delivering water as provided herein. City shall provide notice as far in advance as practicable of any such interruption, except in the case of emergency or disaster in which case no advance notice will be required, but notice shall be given as promptly as feasible. City shall use its best efforts to avoid and minimize any such temporary interruption of deliveries, and shall resume deliveries as soon as City determines, in its sole and exclusive discretion, that it is practicably feasible to do so. Interruption in deliveries shall not affect Water Company's payment obligation for water delivered set forth herein.

6.4 Measurement of Water Delivered. The water delivered under this Agreement shall be measured by a meter at the interconnection. The meter shall be owned, operated, maintained, replaced and read by City, subject to Water Company's right to annual testing and calibration of the flow meter to verify accuracy. Each party shall have the right to test the meter at its own expense.

6.5 Operations. Water Company recognizes and agrees that City shall have the right, in its sole and exclusive discretion, to operate the City water system including but not limited to treatment plants, transmission facilities, storage tanks, and pump stations. Water Company recognizes and agrees that there is no guarantee of consistent pressure at the meter and that fluctuations will occur based on City's operation of various treatment plants. Water Company bears full responsibility for providing adequate conveyance facilities to accept and make beneficial use of the water once it passes through the meter.

6.6 Reporting. Water Company shall report all water delivered under this Agreement to the applicable reporting agencies, including, but not limited to, County of Napa, which shall be responsible for all permit and license enforcement.

## 7. WATER COMPANY'S OBLIGATIONS.

7.1 Facilities. Water Company shall be solely responsible, at its own expense, for designing, constructing, operating, and maintaining the private water line to the City meter at the interconnection. Water Company shall be solely responsible for obtaining any and all necessary licenses, easements, rights of way, and property interests as may be reasonably necessary to build the interconnection and deliver the water to Water Company.

7.2 Permitting. Water Company shall be solely responsible, at its own expense, for obtaining any and all regulatory and environmental permits, licenses or other approvals necessary to

construct and operate the Interconnection, including, but not limited to construction permits from the County of Napa and associated CEQA and other environmental clearances.

7.3 Water Distribution. Water Company shall be solely responsible for the control, carriage, handling, use, disposal, and distribution of water supplied to Water Company hereunder after it has passed through the City meter.

7.4 Boundaries of Water Use. Water Company shall only supply water received under this Agreement to its shareholders for their own use within the Carneros Water Service Area in effect as of March 1, 2018, as depicted on Exhibit A and in accordance with applicable law and the Company's articles of incorporation. Neither Water Company nor any of its shareholders shall use the water supplied under this Agreement outside of those boundaries, even if the boundaries are amended from time to time, without first amending this Agreement pursuant to Section 12.11.

7.5 Limitations on Water Users. Notwithstanding any future changes to the number or type of units served by Water Company, the use of the water supplied under this Agreement shall be limited to the existing number of units within the current boundaries, unless this Agreement is amended. The existing units are comprised of 86 resort cottages (including 10 two-cottage suites), 24 whole ownership homes, and 17 fractional ownership homes depicted on a map (**Exhibit D**), which is attached hereto and incorporated by this reference. Water Company shall not transfer, remarket, or sell the water supplied under this Agreement to any parties or persons within the Carneros Water Service Area except its shareholders, or any other parties or persons outside the Carneros Water Service Area, without first amending this agreement pursuant to Section 12.11, and shall utilize best efforts to prevent its shareholders from doing so.

7.7 Records of Performance. Water Company shall maintain adequate records of performance under this Agreement (including invoices for payment and payments received) and make these records available to City for inspection, audit, and copying, during the term of this Agreement and until four years after the Agreement has expired or been terminated.

8. CONDITIONS PRECEDENT TO THIS AGREEMENT. Water Company and City acknowledge and agree that the following are conditions precedent to the City's execution of this Agreement: (a) LAFCO's authorization for City to extend water service, pursuant to Government Code Sections 56133 and 56133.5; and (b) County of Napa's approval for Water Company to construct a water line and connect to the Interconnection, pursuant to the issuance of a use permit (or comparable land use approval) and analysis thereof under the California Environmental Quality Act ("CEQA"). Because the LAFCO and County approvals are essential consideration for this Agreement, failure to obtain either or both approvals will preclude City from entering into this Agreement.

## 9. TERMINATION AND DEFAULT.

9.1 Termination. In addition to any other rights of termination and suspension set forth under this Agreement or at law, City shall have the right, in its sole and exclusive discretion, to terminate this Agreement upon thirty (30) days' written notice for the following causes: (a) Water Company takes water at a rate greater than that specified or at times not authorized in this Agreement, (b) Water Company defaults in payment of the monthly bill for greater than ninety (90) days, and/or (c) an approval which was a condition precedent to this Agreement is revoked or terminated.

9.2 Default. Water Company shall be deemed in default of this Agreement if Water Company is not complying with the terms of this Agreement or fails to provide City with reasonable assurances of Water Company's ability to perform its obligations under this Agreement within thirty (30) days of City's written request. If either of these circumstances exist, City may give written notice of default to Water Company and demand that the default be cured or corrected within ten (10) days of the notice, unless City determines that additional time is reasonably necessary to cure the default. If Water Company fails to cure the default within the time specified in the notice, and Water Company fails to give adequate written assurance of due performance within the specified



time, then City may terminate this Agreement in accordance with Paragraph 9.1 (Termination), or the City may pursue dispute resolution in accordance with Section 10 (Dispute Resolution).

9.3 Surviving Clauses. The following provisions shall survive expiration or termination of this Agreement: Paragraph 7.7 (Records of Performance), Section 10 (Dispute Resolution), Paragraph 11.2 (Indemnification), and Section 12 (General Provisions).

#### 10. DISPUTE RESOLUTION.

10.1 Meet and Confer. If any dispute arises between the parties in relation to this Agreement, the Authorized Representatives for each party shall meet, in person, as soon as practicable, to engage in a good faith effort to resolve the dispute informally. If the parties are unable to resolve the dispute, in whole or in part, through informal discussions, the parties agree to participate in mediation. Notwithstanding the existence of a dispute, City shall continue providing Water Company with the Water Supply during the course of any dispute, except as otherwise provided for in this Agreement.

10.2 Notice. Either party may give written notice to the other party of a request to submit a dispute to mediation, and a mediation session must take place within sixty (60) days of the date that such notice is given, or sooner if reasonably practicable. The parties shall jointly appoint a mutually acceptable mediator. The parties shall share equally the costs of the mediator; however, each party shall pay its own costs of preparing for and participating in the mediation, including any legal costs.

10.3 Conditions Precedent. Good faith participation in mediation pursuant to this Section 10 is a condition precedent to either party commencing litigation in relation to the dispute. In addition, any claims by Water Company arising from or related to this Agreement are subject to the claim presentment requirements in the Government Claims Act (Government Code section 900 et seq.).

#### 11. LIABILITY AND INDEMNITY.

11.1 Limitation on Liability. Neither City nor any of its officers, agents, or employees shall be liable for the control, carriage, handling, use, disposal or distribution of water after it has passed the Interconnection hereunder, nor for any damage or claim of damage of any nature whatsoever, including but not limited to property damage, personal injury or death arising out of or connected with the same.

11.2 Indemnification. To the full extent permitted by law, Water Company shall indemnify, hold harmless, release and defend City, its officers, employees and agents from and against any and all actions, claims, demands, damages, disability, losses, expenses including attorney's fees and other defense costs and liabilities of any nature that may be asserted by any third party including, but not limited to, Congress Valley Water District, arising out of this Agreement excepting only liabilities due to the sole negligence or willful misconduct of City. This indemnification obligation is not limited in any way by any limitation on the amount or type of damages or compensation payable by or for Water Company under Worker's Compensation, disability or other employee benefit acts or the terms, applicability of limitations or any insurance held or provided by Water Company and shall continue to bind the parties after termination/completion of this Agreement.

11.3 Third Party Claims. Promptly following notice of any third party claims for which City is indemnified hereunder, City shall notify Water Company of such claim in writing. Water Company shall have a period of thirty (30) days following receipt of such notice to notify City of whether Water Company elects to assume the defense thereof. If Water Company so notifies City that it elects to assume the defense, Water Company thereafter shall undertake and diligently pursue the defense of the third party claim. Water Company shall not consent to entry of a judgment or enter into any settlement agreement without the consent of the City, which does not include a complete and unconditional release of City or which imposes injunctive or other equitable relief against City. City shall be entitled to participate in, but not control, the defense thereof, with counsel of its choice and at its own expense. If Water Company does not give the requisite notice, or fails to assume and

diligently pursue the defense of such third party claim, City may defend against such third party claim in such manner as it may deem appropriate, at Water Company's expense, including without limitation settlement thereof on such terms as City may deem appropriate and to pursue such remedies as may be available to City against Water Company. Notwithstanding the foregoing, City shall not consent to entry of a judgment or enter into any settlement agreement without the consent of Water Company, which does not include a complete and unconditional release of Water Company.

11.4 Notice of Claims. The parties shall promptly notify each other within ten (10) days of City or Water Company becoming aware of: (1) any claims or suits brought against City or Water Company which involve this Agreement or water supplied to Water Company pursuant to this Agreement, (2) any third party claims, and (3) any *force majeure* event.

11.5. No Damages. Under no circumstances shall either party be liable for any indirect, special, incidental, punitive or consequential damages of any kind under this Agreement even if the other party has been advised of the possibility of such damages.

## 12. GENERAL PROVISIONS

12.1 Headings. The heading titles for each section of this Agreement are included only as a guide to the contents and are not to be considered as controlling, enlarging, or restricting the interpretation of the Agreement.

12.2. Attorney's Fees. In the event any legal action is commenced to enforce this Agreement, the prevailing party is entitled to reasonable attorney's fees, costs, and expenses incurred.

12.3 Governing Law, Jurisdiction, and Venue. The interpretation, validity, and enforcement of this Agreement shall be governed and interpreted in accordance with the laws of the State of California. Any suit, claim, or legal proceeding of any kind related to this Agreement shall be filed and heard in a court of competent jurisdiction in the County of Napa.

12.4 Notices. All notices or requests required or contemplated by this Agreement shall be in writing and delivered to the other party's authorized representative by personal delivery, U.S. Mail, nationwide overnight delivery service, email, or as otherwise specified herein. Delivery is deemed effective upon the first to occur of: (a) actual receipt by a party's Authorized Representative, (b) actual receipt at the address identified below, or (c) three business days following deposit in the U.S. Mail of registered or certified mail sent to the address identified below. A party's contact information, below, may be changed by providing written notice of any change to the other party.

TO CITY: Phil Brun  
Utilities Director  
City of Napa  
P.O. Box 660  
Napa, CA 94559-0660  
[pbrun@cityofnapa.org](mailto:pbrun@cityofnapa.org)

TO CARNEROS: Greg Flynn  
Carneros Resort & Spa  
4048 Sonoma Highway  
Napa, CA 94559  
[gflynn@flynnholdings.com](mailto:gflynn@flynnholdings.com)

12.5 Books and Records. During regular office hours, each of the parties hereto and their duly authorized representatives shall have the right to inspect and make copies of any books, records, or reports of the other party pertaining to this Agreement or matters related hereto. Each

of the parties hereto shall maintain and make available for such inspection accurate records of all of its costs, disbursements and receipts with respect to its activities under this Agreement.

12.6. No Third Party Beneficiary. Nothing in this Agreement shall be construed or deemed as intending to create or confer any third party beneficiaries or rights in any third parties.

12.7. Successors and Assigns. This Agreement and all of its provisions shall apply to and bind the successors and assigns of the parties hereto.

12.8. Assignment and Delegation. This Agreement shall not be assigned or transferred in whole or in part, nor shall any of Water Company's duties be delegated unless and until it is approved in writing by City and made subject to such reasonable terms and conditions as City may impose. Any attempt to assign, transfer, or delegate this Agreement, in whole or any part, without the City's prior written consent shall be void and of no force or effect. Any consent by City to one assignment, transfer, or delegation shall not be deemed to be consent to any subsequent assignment, transfer, or delegation.

12.9. Privileges and Immunities. The parties hereby agree that the activities of each parties' officers, agents, and employees shall be subject to the privileges, immunities, and protections of Government Code section 6513.

12.10 Waiver. No waiver of a breach, default, or duty under this Agreement shall be effective unless it is in writing and signed by the party waiving the breach, default, or duty. Waiver of a breach, default, or duty under this Agreement shall not constitute a continuing waiver or a waiver of any subsequent breach, default, or duty under this Agreement.

12.11 Modifications. This Agreement may not be amended or modified orally. No amendment or modification of this Agreement is binding unless it is in a writing signed by both parties.

12.12 Provisions Deemed Inserted. Every provision of law required to be inserted or referenced in this Agreement shall be deemed to be inserted or referenced.

12.13 Interpretation. Each party to this Agreement has had an opportunity to review the Agreement, consult with its respective legal counsel regarding the meaning of the Agreement, and negotiate revisions to the Agreement. Accordingly, Civil Code Section 1654 shall not apply to interpret any uncertainty in the meaning of the Agreement.

12.14 Entire Agreement. This Agreement, including all documents incorporated herein by reference, comprises the entire integrated understanding between the parties concerning the subject matter described herein. This Agreement supersedes all prior negotiations, agreements, and understandings regarding this matter, whether written or oral. The documents incorporated by reference into this Agreement are complementary; what is called for in one is binding as if called for in all. If any provision in any document attached or incorporated into this Agreement conflicts or is inconsistent with a provision in the body of this Agreement, the provisions in the body of this Agreement shall control over any such conflicting or inconsistent provisions.

12.15 Severability. If any term of this Agreement (including any phrase, provision, covenant, or condition) is held by a court of competent jurisdiction to be invalid or unenforceable, the Agreement shall be construed as not containing that term, and the remainder of this Agreement shall remain in full force and effect; provided, however, this section shall not be applied to the extent that it would result in a frustration of the parties' intent under this Agreement.

12.16 Signatures. The individuals executing this Agreement represent and warrant that they have the right, power, legal capacity, and authority to enter into and to execute this Agreement on behalf of the respective legal entities of Water Company and City.



IN WITNESS WHEREOF, the parties hereto have executed this Agreement to be effective on the Effective Date set forth below.

**CITY:**

CITY OF NAPA, a California charter city

  
Phil Brun, Utilities Director

**WATER COMPANY:**

CARNEROS MUTUAL WATER COMPANY,  
a nonprofit mutual water company


  
Greg Flynn, Vice President

**ATTEST:**

  
Tiffany Carranza, City Clerk

Date: 11/14/2019  
("Effective Date")

**COUNTERSIGNED:**

  
Desiree Brun, City Auditor  
for SASHA PAVASUARI, Deputy City Auditor

**APPROVED AS TO FORM:**

  
Michael W. Barrett, City Attorney

**Attachments:**

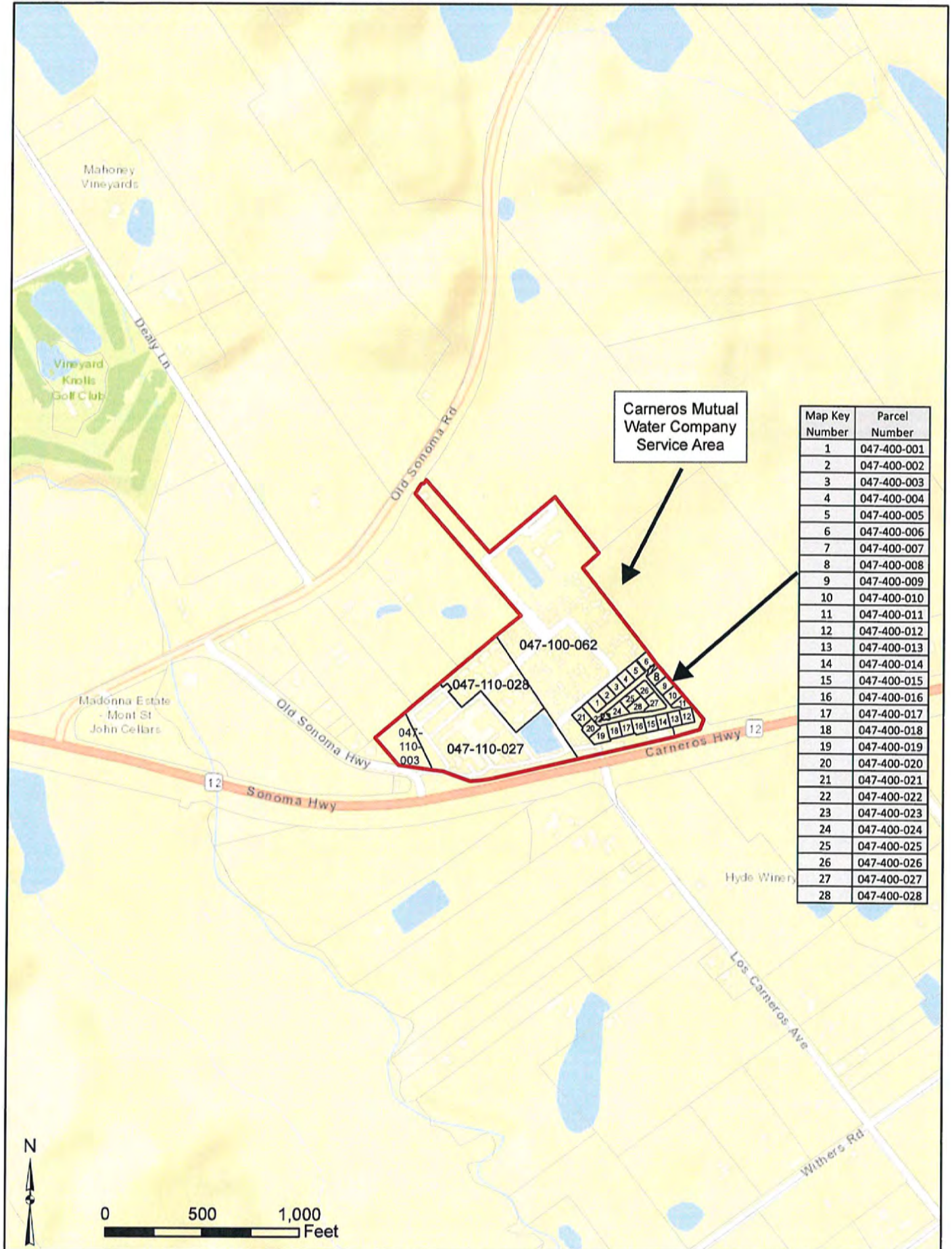
Exhibit A: Carneros Water Service Area

Exhibit B: Interconnection

Exhibit C: Term Sheet

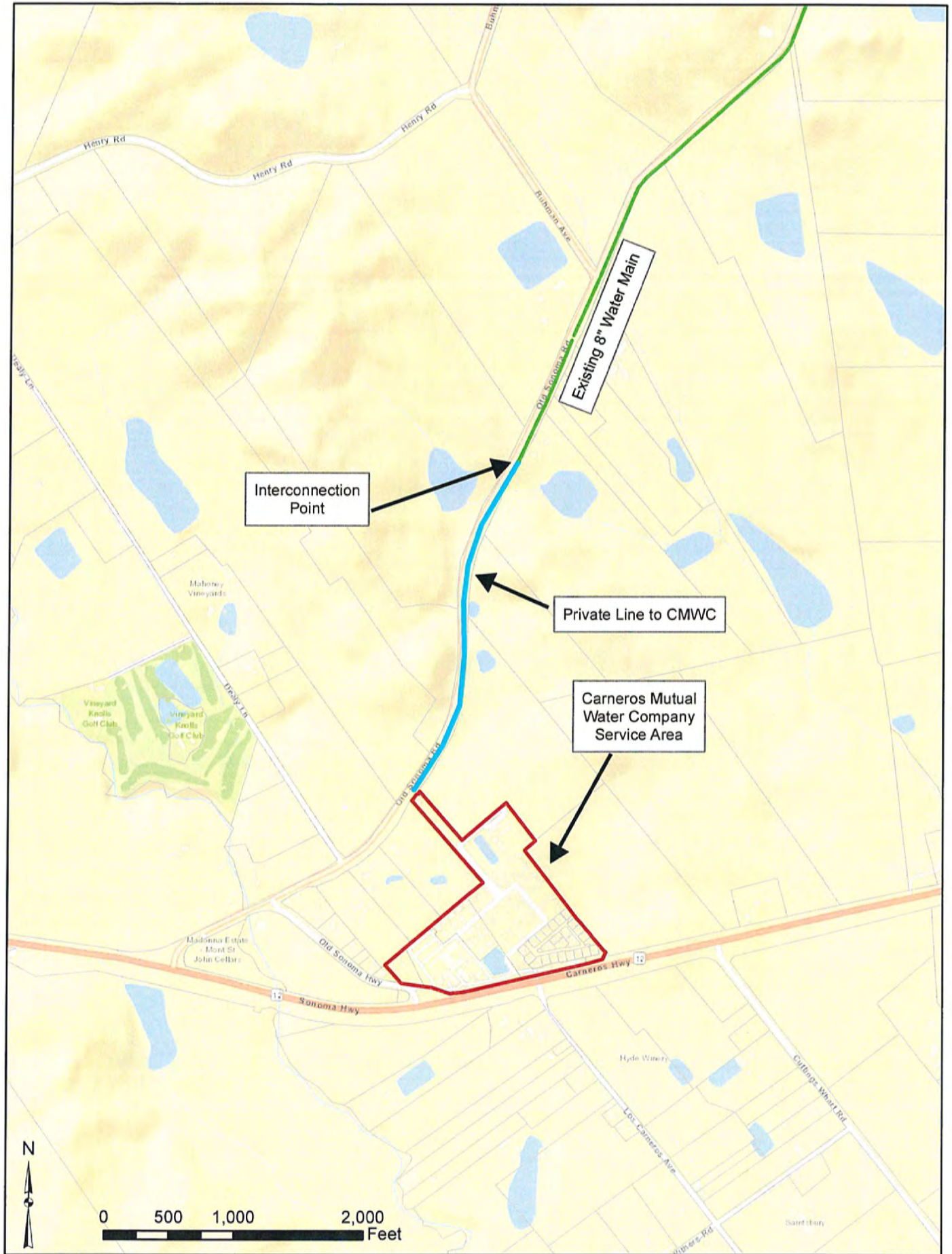
Exhibit D: Existing Water Company Water Users

# EXHIBIT A — CARNEROS WATER SERVICE AREA





## EXHIBIT B — INTERCONNECTION



**NON-BINDING SUMMARY OF CONCEPTUAL TERMS  
of a  
WHOLESALE WATER AGREEMENT  
between the City of Napa  
and Carneros Mutual Water Company**

**(March 20, 2018)**

**This Non-Binding Summary of Conceptual Terms of a Wholesale Water Agreement ("Summary Terms") is intended to reflect a summary of the conceptual terms tentatively agreed upon between the negotiating representatives from the City of Napa ("City") and the Carneros Mutual Water Company ("Company"). These Summary Terms are not binding on either party unless they are embodied in a Wholesale Water Agreement negotiated and executed by both parties.**

- 1. Supply:** City will supply Company with a minimum of 33 and a maximum of 43 acre-feet of water per year. The water will be wheeled through Congress Valley Water District ("District") pipes pursuant to the terms of the current water supply contract between the City and the District.
- 2. Term:** The term of the proposed Wholesale Water Agreement will be 50 years.
- 3. Rates and Fees:**
  - Company will pay for water at City's outside commercial rate, as that rate may be adjusted from time to time by resolution of the City Council.
  - If Company receives less than 33 acre-feet in any fiscal year, Company will pay City the minimum annual payment for that fiscal year equal to the outside commercial rate for 33 acre-feet.
  - Company will pay all standard water fees to establish connection to the system.
- 4. Water Use:** Company may only supply water to its shareholders for their own use within its service area, as provided by law and Company's articles of incorporation. Neither Company nor its customers may provide water to third parties or transfer it for use outside the service area in effect on March 1, 2018 (the "Contract Service Area").
- 5. No Expansion:** Neither the boundaries of the Contract Service Area nor the current number of units within it (86 resort cottages plus 24 whole ownership and 17 fractional ownership homes) shall be expanded during the term of the Wholesale Water Agreement.



6. **Water Line:** Company will, at its own expense, design, build, maintain and operate a private water line from a City meter (to be installed by the City near the terminus of the existing 8-inch water line on Old Sonoma Road) to the Company's Contract Service Area (identified as the "proposed water line extension" on the map attached). Company will be responsible for obtaining all property interests necessary to construct, maintain, and operate the proposed water line extension, which may include the use of County of Napa ("County") right of way on Old Sonoma Road.
7. **Contribution:** Company will pay the City an amount equal to 50% of the City's cost to design and construct a new water storage tank to serve the Browns Valley area, up to a maximum payment by Company of \$1.75 million. This payment by Company represents a supplemental contribution by Company in consideration for the City's discretionary approval of the terms of the proposed Wholesale Water Agreement, since the Company's use of water under the proposed Wholesale Water Agreement does not require construction of the new tank. Company will pay the City \$1.75 million prior to receiving wholesale water from the City via the newly-constructed pipeline extension, and the City will place that amount in an escrow account until construction of the storage tank is complete. At the time of completion of construction of the storage tank: (a) if the cost of construction is \$3.5 million or greater, the City will retain the entire \$1.75 million payment; and (b) if the cost of construction is less than \$3.5 million, the City will reimburse Company in an amount equal to \$1.75 million less 50% of the cost of construction.
8. **Groundwater:** Nothing in the Wholesale Water Agreement will preclude Company from continuing to extract and use groundwater up to a maximum amount to be determined by County.
9. **Reporting:** City will report all water use to County, which will be responsible for all permit and license enforcement.
10. **Environmental:** Company will, at its own expense, obtain all permits necessary to construct and operate the water line. Since the County will be the lead agency for CEQA review, the County's approval of compliance with CEQA will be a condition precedent of the proposed Wholesale Water Agreement. Company will pay the cost of environmental review.
11. **City's Right to Interrupt Water Supply:** Company agrees that the terms of the proposed Wholesale Water Agreement will be subject to the City's standard terms of delivery of wholesale water, including the right to interrupt water supply due to circumstances that are outside the control of the City, based on terms similar to those set forth in the Water Supply Agreement between the City of Napa and the City of St. Helena.
12. **Remedies for Inadvertent Excess Water Use:** City will have no obligation to provide water supply to the Company beyond the maximum of 43 acre-feet of water per year under the Water Supply Agreement. In the event that Company

**inadvertently exceeds the maximum annual use of water in any year, the City will report the excess use to the County, the Company will decrease the annual use in the subsequent year so that the average annual water use over any two years will not exceed 43-acre feet, and the Company will pay a surcharge to cover the City's costs of adjusting and monitoring the water use.**

- 13. Trucked Water: City will not provide trucked water for any use within the Contract Service Area; except that, to the extent that the Company provides evidence of an unforeseen interruption of water supply from the City under the Water Supply Agreement, the City may provide trucked water. However, the total amount of all water supplied by the City to the Contract Service Area will not exceed the maximum of 43 acre-feet of water per year.**

ILLUSTRATIVE MASTER PLAN

LEGEND

- 1 MAIN ENTRY WITH IMPROVED SIGNAGE, CIRCULATION & LANDSCAPE
- 2 RESORT ENTRY WITH RAMMED EARTH WALLS AND SIGNATURE CANARY ISLAND PALMS
- 3 RESORT ENTRY DRIVE WITH ANCIENT OLIVE ALLEE
- 4 RELOCATED BOON FLY CAFE & OUTDOOR DINING TERRACE
- 5 RELOCATED MARKET INTO RETROFITTED SALES & MARKETING
- 6 IMPROVED LANDSCAPE AT FARM WITH KITCHEN GARDENS, FRUIT & NUT ORCHARD, VINE COVERED ARBOR, AND MULBERRY BOSQUE
- 7 EXISTING RESORT RECEPTION
- 8 EXISTING RESORT RECEPTION PLAZA & PORTE COCHERE
- 9 EXPANDED EXISTING PARKING LOT
- 9A EXTENDED PARKING LOT
- 10 CHICKEN COOP & RUN
- 11 EXISTING KIDS' WADING POOL
- 12 EXISTING TRELLIS OVER RAISED DECK & CHAIR LOUNGES
- 13 EXISTING IMPROVED ORCHARD MEADOW
- 14 EXISTING ENTRY PAVILION AT ORCHARD MEADOW
- 15 EXISTING RAISED CEREMONIAL TERRACE
- 16 EXISTING VINEYARD WALK
- 17 EXISTING CYPRESS WALK
- 18 EXISTING HILLTOP ENTRY
- 19 EXISTING MEMBERS' CLUB
- 20 HILLTOP COTTAGE SUITES CLUSTER
- 21 RESTAURANT & HARVEST PATIO
- 22 EXISTING POOL WITH BEACH ENTRY, INFINITY EDGE & PLUNGE POOL
- 23 JACUZZI WITH TRELLIS, FIREPIT AND VINEYARD VIEWS
- 24 POOLSIDE CASANAS
- 25 EXISTING DECORATIVE PAVERS AT PEDESTRIAN CROSSING
- 26 CALFIRE SHED WITH GRAVEL DRIVEWAY TO OLD SONOMA HIGHWAY
- 27 NOT USED
- 28 EXISTING COTTAGE TO REMAIN
- 29 PICKLEBALL COURTS

